United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 74-2326
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-2326

In the Matter

of

D. H. OVERMYER CO., INC., (Ohio) et al, — Index No. 73 B 1126-62 1175 and 1189

and

D. H. OVERMYER CO., INC.,(Missouri) — Index No. 73 B 1146

Debtors,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE, DAVID SPATZ ST. LOUIS 2 and 3

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BRIEF OF LANDLORD-APPELLEE

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2. Whether the Appellant can at this time and before this tribunal for the first time raise new questions of fact and new questions of law.

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BRIEF OF APPELLEE, DAVID SPATZ
ST. LOUIS 2 AND 3

INTRODUCTORY STATEMENT

David Spatz (hereafter "Spatz"), the owner of the warehouses located at 6501 North Hall Street, St. Louis, Missouri, (known as St. Louis #2 and #3, hereafter "St. Lou[illegible]"), submits this Brief in answer to the appeal of the [illegible]iver and the Debtors in Possession from a ruling of the United States District Court, Judge Henry Werker, on October 4, 1974. Significantly, in preparing Appellant's Brief for this Court, the Appellant included in the Appendix its own Brief in the Court below but entirely neglected to set forth the Briefs of any of the other parties to this proceeding. St. Louis 2 and 3 is, therefore, filing an Additional Appendix (hereafter "A.A.") which includes the

Brief submitted by St. Louis 2 and 3 in the proceedings before the Honorable Henry F. Werker, District Judge. The issues discussed in this answering Brief assume a reading of the Additional Appendix, which likewise includes Article XV, Conditional Limitation-Default Provisions, excerpted from the lease between the parties.

STATEMENT OF THE CASE

The case has basicly been set forth in Appellant's Brief, A.A., p 1 . The landlord proved without rebuttal by the Debtor before Bankruptcy Judge Babitt that the lease for St. Louis warehouses #2 and #3 was terminated prior to the commencement of the within bankruptcy proceeding by virtue of (a) the mailing of a notice of default dated May 31, 1973 alleging default in payment of rent and real estate taxes (together with other defaults) aggregating $43,398.00 as of June 30, 1973, (Exhibit A to Landlord's Amended Application (29A, Record on Appeal); (b) mailing of a termination notice dated June 27, 1973, giving 30 days notice effective July 31, 1973, (Exhibit "B" to Landlord's Amended Application (29A, Record on Appeal); pursuant to the lease Paragraph XV, Conditional Limitation-Default Provisions, Appendix, Page 40) A.A. P 18 ; (c) the commencement of an unlawful detainer action in the Magistrate Court, City of St. Louis, Missouri in August, 1973 (0.7); (d) the commencement of an action in the Circuit Court of St. Louis, State of Missouri, Cause Nos.

71899 and 71900 against D. H. Overmyer Co., Inc., Servicenter, Inc. and Continental Can Company, Inc., for money damages. Upon the hearing before Bankruptcy Judge Babitt, he entered an order dissolving the temporary restraining order as it applied to Spatz but stayed the delivery of the possession of the premises pending appeal to the U. S. District Court. The District Court, Judge Werker, upheld the opinion of Bankruptcy Judge Babitt and stay of the possession of the premises terminated September 30, 1974. From the order and opinion of Judge Werker, the Debtor in Possession and Receiver appealed.

STATEMENT OF FACTS

The Court's attention is directed to the lengthy and complete Statement of Facts set forth in the opinions of the Bankruptcy Judge Roy Babitt, Appendix 30-35, to the Statement of Facts contained in the Opinion of the District Court Judge Henry F. Werker, Appendix 10-12, and the Memorandum of Law of David Spatz submitted to Judge Werker, A.A. P 1 .

The Appellant takes the position that the filing of facts contained in the District Court opinion with regard to St. Louis 2 and 3 is completely erroneous. That opinion, Appendix, P. 20, in part states as follows:

> "In a third case (St. Louis No. 2 and No. 3) the attorney for the receiver admitted on the record that the equities for the landlord were far stronger than they had been in the Queens Boulevard case. Overmyer's default in rent

> and taxes for the St. Louis property were substantial. The landlord sent notice of default in May and notice of termination in June. Yet, when the landlord thereafter commenced an action for possession, Overmyer entered a general denial, clearly a sham answer meant only to create delay." (Underscoring supplied).

The Appellant admits that notices of default and termination were sent but contends that the remainder of the findings are erroneous including, of course, the finding that Overmyer entered a general denial of the action for possession. The Court's attention is directed to Appendix 0-7 and 0-8. Mr. Sandler speaking for the Receiver stated:

> "MR. SANDLER: I believe we can stipulate that the action was commenced and that the defendant appeared by counsel and generally denied all the allegations in the complaint in that particular action."

Quite clearly, the Appellant admitted general denial which in turn was determined by Judge Werker to constitute a sham to create delay. The Appellant offers no facts to contradict same.

The next factual issue which the Appellant attempts to attack relates to the amount of money due the landlord as at November 16, 1973, the date of the inception of the Chapter XI proceedings. The Appellant's Brief attempts to show that the default in rent and real estate taxes by Overmyer were insubstantial, if in fact they existed at all.

The facts were submitted to the Bankruptcy Court and to counsel for the Receiver and the Debtor in Possession as follows:

Amounts due through November 16, 1973 are calculated as follows:

Rent for the months February through November, 1973 at $7,932.50 a month for ten months	$79,325.90	
Real Estate taxes based on the actual bills for 1973	25,695.77	
*Legal fees paid to Bernard Barken of St. Louis and Howard R. Slater (Final bills on this have not been rendered)	16,176.00	
*Interest at the rate of 6% per annum computed monthly on the unpaid rent pursuant to the lease	6,140.53	
Total Due Landlord		$127,338.20

*Paragraph XV, Conditional Limitation, Default Provisions, clearly provides that the landlord is entitled to collect his reasonable legal fees and interest on monies unpaid.

Monies received during 1973 and credited to sums due from the tenant in mitigation of damages, as follows:

Paid by Overmyer pursuant to stipulation that payment shall not constitute payment of rent	$17,000.00	
As a result of action for monies due (referred to earlier herein (Circuit Court of St. Louis, Causes No. 71899 and 71900), these monies were paid pursuant to stipulation, A.A. P. ____, by Continental Can Company and credited by the landlord to the account of Overmyer in mitigation of damages	$74,198.65	

Less monies paid to Lessee's attorney	$1,500.00		
Court costs	23.03		
Net amount credited in mitigation of damages		$72,675.57	
Total received subsequent to termination of lease			$89,675.57
Balance due landlord as at Nov. 16, 1973			$37,662.63

Finally, last but not least, the Appellant very conveniently overlooks the fact that during the period of administration, to-wit: from July 1, 1974 through and including date hereof, no rent has been paid for the months of July, August, September, October and November, 1974, a total of five (5) months at the rate of $7,932.50 a month, or a total of $39,662.50.

In summation, Spatz takes the position that there is due him prior to the proceedings for an arrangement, the sum of $37,662.63, plus interest thereon and additional legal fees as provided for in the lease, and the sum of $39,662.50 for unpaid use and occupancy during the period of administration. The Appellant would have the Court believe that these are "insubstantial" amounts.

The Court's attention is further directed to A.A., P. 5-6, which indicates the economic burdens and losses sustained by David Spatz as a result of non-payment of rent and taxes.

POINT I.

THE LAW OF LANDLORD AND TENANT OF THE STATE OF MISSOURI PROVIDES FOR THREE METHODS TO TERMINATE AND FORFEIT A TENANCY, INCLUDING "THE LAW OF THE LEASE" WHICH SPATZ RELIED UPON IN TERMINATING OVERMYER'S TENANCY.

As has been so frequently the case in these proceedings, the Appellant's attorneys have consistently misstated the law, and in this instance are misstating the Law of Missouri. Their instant Brief on Pages 9 through 14 purportedly sets forth the law of Missouri which it claims allows a landlord to terminate a lease by either:

(i) declaring a statutory forfeiture; or

(ii) declaring a common law forfeiture.

What the Appellant overlooks, either by error or deliberately, is that a landlord and tenant, under the law of Missouri, may have a lease which provides its own law with regard to forfeiture, to-wit: a default provision specifying in detail exactly what the remedies of the landlord shall be in the event of a default by the tenant. Eurengy v. Equitable Realty Corp. 107 S.W. 2d 68 (S. Ct. Missouri). The lease executed by the Debtor in Possession has such a provision. See A.A. P. 18 ; Carbonetti v. Elms, 261 S.W. 2d 748; Independence Flying Service v. Abitz, 386 S.W. 2d 399.

The Appellant cites two cases, Fritts v. Cloud Oak Flooring Co. 478 S.W. 2d 8 (1972) and Waring v. Rogers,

286 S.W. 2d 374 (1956). Neither of the cases are applicable to the instant situation. The Appellant takes the position that this landlord must comply with the common law of forfeiture deemed to be a harsh remedy, and in order to do so must serve a demand for rent on the due date and, thereafter, service notice of default with a specified time, neither sooner or later, and finally, terminate with a strict regard for time intervals, etc. In support of its position in Fritts, supra, the Supreme Court of Missouri likewise noted that the common law forfeiture shall only be strictly applicable to determine whether or not a landlord has properly terminated a lease where it has not been "waived by agreement". The lease in the instant case, Paragraph XV, constitutes such a waiver by agreement.

Waring v. Rogers, supra, involved a case in which the lease had no default provision whatsoever, which is hardly the instant situation. In the Fritts case, a landlord brought suit pursuant to the statutory law of Missouri which permits collecting double monthly rent in the event of a lease being terminated by default. In that situation, the landlord had consistently accepted rent on a late basis and after three months arrearage had accumulated, permitted tenant to pay same off in installments over the next six months. After the arrearage had been paid off, the tenant's rent check for January, 1970 was mailed on January 5th and

arrived on January 6th. Landlord, who had never made a demand for payment on the first day of the month, and in reliance on a default provision (amended after the arrearage had been accumulated) terminated the lease without notice for failure to pay on time. Under these circumstances, the Missouri Courts held the landlord to a scrupulous observance of the common law. Fritts v. Cloud Oak Flooring Co. 478 S.W. 2d 8, 12.

The facts on the Fritts case and the Waring case simply do not apply or bear any resemblance to the instant situation. Nevertheless, even if one were to apply the standard of the common law of forfeiture to the instant case, the landlord would still be entitled to a judgment for termination and possession. The classical case of Eurengy v. Equitable Realty Corp. 107 S.W. 2d 68,(S. Ct. Missouri) involved a set of facts in which a landlord served a notice of termination upon his tenant alleging two counts, (1) non-payment of rent, and (2) non-payment of real estate taxes. The Court in that case stated that even if the common law of forfeiture does apply in determining whether proper notice of termination was served with regard to non-payment of rent, nevertheless, the common law of forfeiture does not apply to a notice of termination predicated upon non-payment of real estate taxes. The Supreme Court at 107 S.W. 2d 68, 71, said as follows:

"Even if Appellants object to the specifications in the notice was good, it would be of no avail as Appellant was also in default in payment of taxes which alone furnished a proper cause of forfeiture.

It is abundantly clear from the notice of termination and the notice of default, A. A. Pages 27, 30, that the landlord in the instant situation elected to terminate not only for non-payment of rent, but likewise due to failure on the part of the tenant to pay real estate taxes, interest on past due payments of rent and reasonable legal fees due the landlord. Quite obviously, the common law of forfeiture should not be applied to the instant situation.

POINT II

IT IS A RULE OF PRACTICE THAT A REVIEWING COURT WILL NOT CONSIDER ASSIGNMENTS OF ERROR NOT CALLED TO THE ATTENTION OF THE TRIAL COURT WHERE SUCH MATTERS DO NOT CONCERN THE JURISDICTION OF THE COURT.

At no point in these proceedings has the Appellant even argued that the monies due the landlord as at November 16, 1973 were "insubstantial". On the contrary, the Appellant has conceded same. Further, at no point in these proceedings has the Appellant contended that the landlord failed to comply with regard to the law of landlord and tenant in the State of Missouri. On the contrary, they have conceded on all stages in these proceedings that

a proper notice of default was served, a proper notice of termination was served and that in effect that the tenant was substantially in default of its lease obligations as at November 16, 1973.

For the first time in these proceedings, the Appellant raises new issues of fact and new issues of law. As this Brief amply demonstrates, the Appellant is wrong as to both facts and the law. Nevertheless, this Court would not be justified in reversing the judgment below, because the case below was neither tried nor decided either on the alleged fact issue first raised by the Appellant nor upon the legal argument first raised by the Appellant. See Apex Smelting Co. v. Burns, 175 F. 2d 978 (1949), Cert. den. 338 U. S. 911, 70 S. Ct. 350.

The Court in Apex Smelting Co., supra, in part held, 175 F 2d 978,981:

> "And as said by this court in Maloney v. Brandt, 7 Cir., 123 F. 2d 779, 782:
>
> 'It has long been a rule of practice that a reviewing Court will not consider assignments of error not called to the attention of the trial court where such matters do not concern the jurisdiction of the court. It would manifestly be unfair to hold that the trial court had erred in a matter it had not considered. Litigants are not entitled to hide a point in an obscure pleading and present it for the first time on review, but should fully and fairly acquaint the trial court with all matters relied upon'.

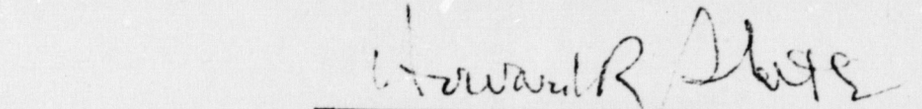
This rule announced in the Maloney case was cited with approval by this Court in Chatz v. Midco Oil Corp., 7 Cir., 152 F. 2d 153, 154. In fact, the cases are legion where the same or a similar rule has been announced and followed. Thomas v. Taylor, 224 U.S. 73, 84, 32 S. Ct. 403, 56 L.Ed. 673; Cold Metal Process Co. v. McLouth Steel Corp., 6 Cir., 170 F. 2d 369, 380; Hebets v. Scott, 9 Cir., 152 F. 2d 739, 741; Saulsbury Oil Co. v. Phillips Petroleum Co., 10 Cir., 142 F. 2d 27, 34."

CONCLUSION

As pointed out throughout these proceedings, this landlord has suffered grievious economic losses. Even now as this proceeding is pending before the Court, the Debtor in Possession is at least five (5) months delinquent in the payment of use and occupancy due the landlord during the period of administration. The Appellant's contention that the landlord would sustain a windfall and that the landlord is protected from financial losses would be laughable if it weren't so outrageous.

Equity demands that the law of landlord and tenant be applied and that this landlord be entitled to recover its property for the purposes of reducing its losses.

Respectfully submitted,



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AFFIDAVIT OF SERVICE

I certify that two copies of the within Brief and Additional Appendix have been served upon the attorneys for the Appellant by enclosing two copies of same in an envelope on which the proper postage was prepaid by depositing the same in the United States mail chute at 33 North LaSalle Street, Chicago, Illinois, before the hour of 6:00 P. M. on November 11, 1974. The full names and addresses shown on such envelopes are as follows:

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Howard R. Slater

Howard R. Slater

Subscribed and sworn to before me

this 11th day of November, 1974.

Arlene Zajac

Notary Public